

WILLS AND ESTATES

Fort Sam Houston Client Services Division

Welcome to the Fort Sam Houston Legal Assistance Office. Attached you will find a Will Worksheet and Instructions. This will worksheet will explain some of the terms and questions used in those documents, prepare you to discuss your needs and desires with an attorney, and provide a convenient form on which to record important information. The Will Worksheet is to help us simplify the process of preparing a will for you.

I. **WHAT IS A WILL?** A will is a legal document which states your desires concerning what will happen to your property after your death. A will also contains other specific directions from you concerning who is to implement your instructions and, perhaps, who will care for any minor children you may leave behind.

II. **DO YOU NEED A WILL?** For Texans, anyone who owns real estate or other property held with a document of title, or who has an estate greater than \$50,000.00, should generally have a will. Most people with minor children will want to have a will. Not only can a guardian and alternate guardian for minors be named in a will, but a trust for minors can be established as well. Naming a guardian simplifies the process of having a guardian appointed by the court and can save the expenses of posting a bond. A trust ensures that money from the estate can be used for the benefit of any children and provides a mechanism for holding and administering money “poured over” from life insurance. Leaving money directly to a relative or trusted friend to provide for minor children, rather than establishing a trust, can cause unforeseen problems. For instance, if the adult becomes incompetent, his or her guardian will be restricted, in most cases, to using the money for the benefit of the incompetent, rather than for the children. Or worse, the money can become subject to the debts of the person named—including fees and debts resulting from lawsuits against them. Finally, in Texas, if you are married with children, you may need a will if you want your spouse to receive the whole estate. This is especially critical if at least one child who is not also the child of his or her spouse.

Making a Will is **entirely voluntary**; you cannot be required to make a Will, even prior to deployment. Contrary to popular belief, if you die without a will, your property does not go to the state, unless you have no surviving kin. Instead, each state has “laws of intestacy” which determine who will receive property and in what proportion when a party dies without a will. Although these laws vary somewhat, generally your property would be distributed as follows:

- If you are single, and have no children, your biological parents would split your property equally, even if they are no longer married;
- In some states, if you are married and have no children, your surviving spouse receives all property acquired *during* the marriage, and your parents receive the remainder;
- In other states, if you are married and have no children, your surviving spouse receives all of your property;
- If you are married and have children, your surviving spouse and children may divide the property. However, the law may require something other than an even split (*that is, the spouse may get only 1/3, and the children receive 2/3*)

As discussed above, however, most people should have a will drafted to make their final intentions clear and prevent state law from dividing the estate.

III. **SIMPLE WILLS ONLY:** The Legal Assistance Office prepares only simple wills. If you have an estate worth over \$1,000,000 (including life insurance benefits), then you should contact an attorney who specializes in estate planning. There are substantial federal gift and estate tax consequences on estates over \$1,000,000. Estates of less than \$1,000,000 do not require planning techniques to address or avoid the federal estate tax. This \$1,000,000 threshold applies to individuals or the combined estates of married couples including community property, separate property, and life insurance. Individuals and married couples with assets over \$1,000,000 should consult with an estate planner. Although considerable tax savings can be achieved from proper estate planning for this size of an estate, a simple will is not sufficient estate planning in such cases.

However, even couples with assets less than \$1,000,000.00 may want to consult an estate planner. For instance, a spendthrift trust can protect a surviving spouse from the claims of creditors, including those resulting from lawsuits. Additionally, specific trusts may need to be established for incompetent adult children or other relatives. Contingent trust for minor children, however, are routinely prepared and included in the simple wills prepared by most military legal offices. Be sure to obtain the specific language for designating the trustee as beneficiary of life insurance if you want insurance proceeds to be paid into such a trust.

IV. **WHAT ABOUT LIFE INSURANCE PROCEEDS (AND OTHER LIMITATIONS ON A WILL)?** Proceeds of insurance policies are distributed as you have designated in the insurance policy, although they are usually taxed as part of your estate. Insurance beneficiaries are listed on the policy and are not affected by the will. Your will is a written legal document providing for the disposition of all your property that you have not disposed of by other means. Insurance is always payable to the beneficiary named in the insurance policy.

Property that you own jointly with another person will normally go to the other joint owner. Such property is usually not controlled by your will, as you can only give away what you own outright; for example, you can leave a mortgaged house to a beneficiary in your will, but the beneficiary will take the property subject to the will.

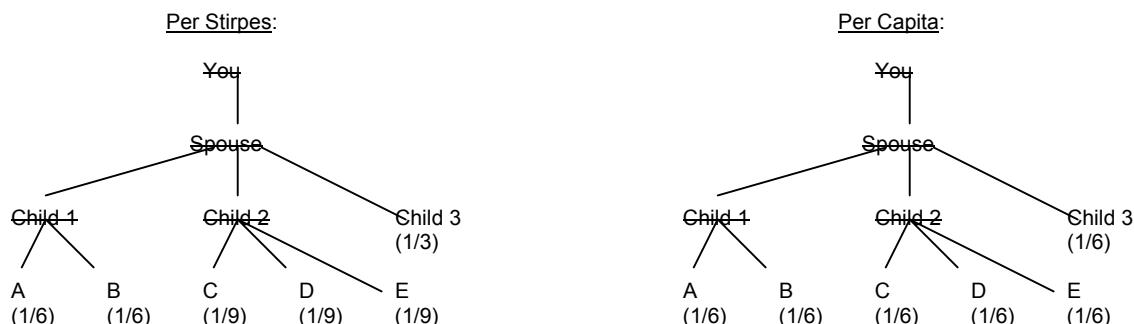
If you have minor children and you plan to leave insurance proceeds (including the SGLI) to them ***in trust***, your insurance policy must be specific: ***"My trustee to fund a trust established for the benefit of my children under my will."***

V. **WHAT ABOUT SPECIAL GIFTS?** A special gift (or "Specific Bequest") is a gift of a particular item to a certain person, charity, or corporation. For example, "I give my 1969 red Mustang convertible to my brother Douglas W. Greene." Specific bequests should be limited to important, valuable items. Be sure to describe the particular item with as much specificity as possible, to avoid any confusion when your will is probated. In the vast majority of cases, it is best to just leave your personal property as a whole to one or more beneficiaries. If the beneficiaries disagree about how items will be divided, your Executor will have the power to decide. You can also leave a separate letter of instruction to guide your Executor, although the letter is not binding.

VI. **WHAT IS THE "RESIDUARY ESTATE"?** Your estate is all your property, including real property (houses, land), tangible personal property (furniture, clothing), and intangible personal property (stocks, bonds, accounts). The residuary estate is composed of everything not specifically bequested or disposed of separately (like an insurance policy). For most people, the residuary estate is the bulk of your will. The first beneficiary (or beneficiaries) will receive the

entire residuary estate; then, the second beneficiary (or beneficiaries) will take the residuary estate if the first beneficiary (or beneficiaries) shall not survive the testator (you).

VII. **WHAT IS PER STIRPES AND PER CAPITA?** When leaving your estate to your children, you have two choices for dividing the estate: (1) Per Stirpes or (2) Per Capita. To explain these options, imagine that you have three children. Child 1 and Child 2 predecease you. Child 3 survives you. The grandchildren will take of your estate in the following manner:



“Per stirpes” means “by the root” or “by right of deceased ancestor.” Per stirpes is the most commonly used type of distribution. “Per capita” means “per head” and is another option available for distribution of your estate. The real difference in the two schemes listed above is how the estate will be divided among the grandchildren. If you leave your estate per stirpes, then the grandchildren are only entitled to the share their parent would have received in the will had the parent survived. From the example, grandchildren A and B are only entitled to divide the 1/3 share that Child 1 one would have been entitled to, thereby each gets 1/2 of 1/3, or 1/6 of a share of the estate. Likewise C, D, and E must divide their shares from the 1/3 of the estate that Child 2 would have been entitled to, thereby each gets 1/3 of 1/3, or 1/9 of a share of the estate. If you leave your estate per capita, then all the eligible surviving beneficiaries will take equally from the estate. From the example, since there are 6 remaining beneficiaries (Child1, A, B, C, D, and E), then each would be entitled to 1/6 of the estate.

Feel free to discuss these three schemes with your Legal Assistance Attorney.

VIII. **WHAT IS AN EXECUTOR?** An executor (also known as a “personal representative” in some states) is the person whom you name in your Will to carry out your desires, as expressed in your Will, and to settle your estate. Once the estate has been settled, the Executor’s duties are ended. Settlement includes paying from your estate any taxes and valid debts you may owe. Usually, a married person names his or her spouse as Executor, but there is no requirement to do so. Often a security fee, or bond, is required of this person; however, most states allow you to specify in your Will that you want the fee waived. Your executor is entitled to a fee for his or her services out of the proceeds of the estate. Your Executor may also hire someone else to meet the Probate Court’s requirements, with costs to be paid out of the proceeds of your estate. Your Executor will have an important role -- choose him or her with care, and discuss the matter with him or her. Be sure that the person you name is one you trust.

IX. **WHAT TO DO ABOUT MINOR CHILDREN?** There are two issues you should decide in your will if your children are minors: (1) Who will raise them, and (2) Who will handle the property and money they inherit.

A trust is similar to a bank account that you create for your children; the property you leave to your children automatically goes into it if you establish one. When your child reaches a certain age that you specify in your will, all the money that remains in the account is distributed to the child. If you have more than one child, each child receives his or her share of the account when (s)he reaches the required age. A Separate Trust sets up an account for each of your children. A Single Trust creates one account that all of your children share and none of the children will receive his or her share until the youngest reaches the distribution age. You appoint a Trustee who is legally responsible for the account to watch over the account and distribute money to your children. The Trustee should be a person in whom you have confidence, someone who knows your children and understand their needs.

There are alternatives to trusts. For example, the Uniform Gifts to Minors Act (UGMA) or the Uniform Transfers to Minors Act (UTMA) creates custodianships which are generally recognized in state law and may be preferable to creating a trust in your will. If one or more of the beneficiaries in your will is a minor, the custodian you appoint establishes an UGMA/UTMA account for each minor. Like a trustee, the UGMA/UTMA custodian will be charged with administering the funds for the benefit of your children. Unlike a trustee, the custodian's duties and responsibilities are defined in state law rather than in your will.

For other matters relating to your children, you should name a legal guardian in your will. A guardian is the person who will act as the parent for any of your children who are minors when you die. Normally, if your spouse survives you, (s)he becomes the children's guardian if (s)he is the biological or adoptive parent of the children. However, it is recommended that you name a guardian and an alternate guardian in the event that both you and your spouse die. If you or your spouse have children not born of your current marriage, you should discuss the situation in detail with an attorney to determine the most appropriate way to provide for the children.

X. **DISINHERITANCE**: You are generally free to dispose of your estate as you wish. However, most states have laws which entitle spouses to at least part of the other spouse's estate. This "statutory share" ranges generally from 1/3 to 1/2 of the other spouse's estate. Some states, such as Louisiana, also provide shares of the estate to children of the decedent.

XI. **WHAT IS PROBATE?** Probate is a court procedure by which a Will is proved to be valid or invalid and your property distributed as you have directed in your Will. Probate proceedings also address the administration of your estate, taxes, the guardianship of children, etc. A valid Will that properly disposes of your property can make this process much easier and cheaper. Fort Sam Houston offers free probate services for anyone with a valid military I.D. card and for an executor probating a will of anyone who had a valid military I.D. card. In other words, if you die (with a valid military I.D. card) and your executor does not have a military I.D., (s)he can still take advantage of our probate services.

XII. **WHAT IF I BECOME INCOMPETENT?** Accidents, diseases, deterioration of mental processes usually occur without notice. Preparing for possible incompetence is the second important purpose in estate planning. Your will, however, will not take effect unless you die. The Texas Legislature has enacted several laws that let you have a voice in decisions that affect your life in the event you lose your capacity to make decisions on your own. These include the durable power of attorney, a designation of a guardian, a durable power of attorney for health care, and a directive to physicians. The legal assistance office has a separate handout to assist you in this planning.

WILL WORKSHEET

PRIVACY ACT STATEMENT

AUTHORITY: United States Code, Title 10, Section 8072. **PRINCIPAL PURPOSE:** To assist a judge advocate in the preparation of a client's will. **ROUTINE USES:** To provide a judge advocate with sufficient information to draft a client's will. The Office of the Staff Judge Advocate maintains no file copy. **MANDATORY OR VOLUNTARY DISCLOSURE AND EFFECT ON INDIVIDUAL BY NOT PROVIDING INFORMATION:** Disclosure is voluntary, but nondisclosure prohibits preparation of a will.

Please Complete The Following. Print Names As You Wish Them To Appear In The Will.

Your Name: _____ Social Security Number _____ - _____ - _____

() Active Duty Service Member () Retired Military () Widow/Widower
() Spouse of Active Duty () Spouse of Retired Military () Other Dependent

Current Marital Status: () Single () Married: Spouse's Name: _____

Were you previously married? () No () Yes

Do you have any children (adopted or natural born) from a former marriage or out of wedlock?
() No () Yes: If yes, list their full names:

Do you have any stepchildren? () No () Yes: If yes, list their full names:

Regarding stepchildren, do you want to:

() DEFINE AND TREAT AS NATURAL CHILDREN, or
() EXCLUDE FROM WILL, or
() OTHER _____

If you have any DECEASED CHILDREN, list their names and whether or not they left descendants:

1. Do you own any real estate? () No () Yes: If yes, in what state is it located? _____

2. Active duty personnel: Which state is annotated on your LES? _____
In which state do you intend to live? _____

3. Are you leaving different real estate properties to different people?
() No () Yes: If yes, explain _____

4. Is your "net value" of estate over **\$1,000,000** (including all post-death assets including life insurance, net value of home, mutual funds, retirement accounts, etc)?

() No () Yes: If yes, what is estimated value? _____

5. Any special bequests (gifts)? (**usually no**) If Yes, please describe specifically and indicate

() Make only if spouse does not survive me, or () Give priority over any other distribution.

ARTICLE

TO WHOM

6. FIRST BENEFICIARY: () SPOUSE () CHILDREN

() OTHER as follows: FULL NAME

RELATIONSHIP

If there are more than one First Beneficiaries, please indicate the percentage of the estate each is to receive. (Example: my nephew George Washington 60% and my cousin Thomas Jefferson 40%.)

7. SECOND BENEFICIARY: Should you not be survived by any of the persons listed as first beneficiaries. () SPOUSE () CHILDREN () OTHER as follows:

FULL NAME

RELATIONSHIP

Note: Usually your child or children are listed as second beneficiaries. Most will read: "If I am not survived by my spouse, then to my children (Jane Doe, John Doe, and any other children I may hereafter have)."

() PER STIRPES () PER CAPITA

8. If none of the above beneficiaries survive you, do you wish to name anyone else? If Yes, please specify: _____

9. A beneficiary is deemed a "minor" if under the age of () 18 () 21 () 25 Other _____

10. Do you wish bequests to minors be held in () Single Trust () Separate Trust () Other

11. First Choice for Trustee: _____
Second Choice for Trustee: _____

12. Executor/Executrix: () SPOUSE () OTHER _____
Alternate (if first choice predeceases you): _____

13. Guardian for Minor Children: () SPOUSE () OTHER _____
Alternate: _____